In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-975

ROBERT LOUIS RICHARDSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court improperly enlarged the record on appeal.

Following a bench trial in the United States District Court for the District of Arizona, petitioner was convicted of having knowingly and intentionally possessed, with intent to distribute, 1,652 pounds of marijuana, in violation of 21 U.S.C. 841(a)(1).[1] He was sentenced to a term of four years' imprisonment.[2] The court of appeals

---

[1]A count charging conspiracy to possess 250 pounds of marijuana with intent to distribute was dismissed (Rec. on App. 4-5, 47).

[2]The district court did not impose a special parole term, which is required by 21 U.S.C. 841(b)(1)(A). *United States* v. *Mack*, 494 F.2d 1204 (C.A. 9); *Bozza* v. *United States*, 330 U.S. 160. The United States has asked the district court to vacate its sentence and reimpose sentence pursuant to the statute. This motion is under consideration in that court.

affirmed (Pet. App. B) and, on December 4, 1974, denied rehearing (Pet. App. A). The petition for a writ of certiorari was not filed until February 6, 1975, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. In any event, there is no reason to grant the writ.

1. Petitioner contends that the trial court should not have ordered the record enlarged, pursuant to Fed. R. App. P. 10(e). He argues that enlargement of the record on appeal (to include a complaint and arrest warrant) is unfair because his attempt to suppress the marijuana before and during trial had been predicated on the presumed absence of an arrest warrant, and because the prosecution did not rely on the warrant in the district court.

Rule 10(e) permits the district court, either before or after transmission of the record to the court of appeals, to remedy a material omission from the record on appeal. The court of appeals held that the complaint and warrant were in the record before the district court (Pet. App. B, pp. 2b-4b), and petitioner does not now contest this conclusion. It was therefore entirely proper for the district court to enlarge the record on appeal to include these documents, which should have been transmitted to the court of appeals in the first instance. Once the documents were properly before that court, petitioner was entitled to (and did) contend that his defense had been impaired by his alleged previous ignorance of the complaint and warrant.[3] Whatever may be the merits of the claim of ignorance and consequent prejudice, this was

[3]The court of appeals observed that the warrant was in the district court file "long before the suppression hearing" (Pet. App. B, p. 3b) and that petitioner had been told at the time of his arrest that the arrest was pursuant to a warrant (*id.* at 2b).

not an adequate reason to preclude the court of appeals from having access to the complaint and warrant.

2. In any event, the court of appeals properly concluded that petitioner was not prejudiced by his asserted lack of knowledge of the warrant. Assuming, *arguendo,* both that the record was improperly enlarged on appeal and that petitioner's arrest was unlawful, there still would be no ground upon which to suppress the marijuana. As the court of appeals noted (Pet. App. B, p. 4b, n. 3), "the evidence sought to be suppressed was procured pursuant to a valid search warrant, obtained without reliance upon the defendant's arrest in any way, thereby rendering substantially irrelevant any inquiry into the validity of the defendant's arrest." Petitioner does not contest the validity of the search warrant, and the discovery of the marijuana was a fruit solely of the search of petitioner's house pursuant to that valid warrant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.